

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB- REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 237 OF 2021**

**SADICK JUMA ..... APPELLANT**

***VERSUS***

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the District Court of Ilala at Kinyerezi  
in Criminal Case No. 737 of 2019)**

**JUDGMENT**

28<sup>th</sup> March & 25<sup>th</sup> April, 2022

**KISANYA, J.:**

The appellant and three other persons (who are not party to this appeal) were arraigned before the District Court of Ilala with two counts of the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16, R.E. 2019]. The first count was to the effect that, on 29<sup>th</sup> September, 2019 at Kigogo Fresh, Chanika area within Ilala District in Dar es Salaam Region, the appellant and three others did steal one hand bag and cash money to the tune of Tshs. 30,000/=, the properties of Afsa Daudi (PW1) and that immediately before such stealing they threaten the said Afsa Daudi by stabbing her with a screwdriver on her neck and head. On the second count, it was alleged on the same day and place, the appellant and

three others did steal "one hand" the property of Philopo Lusozi (PW3) and that immediately before and after such stealing they threaten him with a knife and screwdriver in order to obtain and retain the stolen property.

The prosecution relied on evidence of two victims namely, Hafsa Daudi (PW1) and Philopo Ambrozi Lusozi (PW3); and two police officers, Assistant Inspector Warioba Kikanga (PW2) and G8583 DC Shafii (PW4). Their evidence can be summarized as follows; the victims (PW1 and PW3) resides at Kigogo Fresh, Chanika area within Ilala District, Dar es Salaam and were conducting business at Ferry area within Dar es Salaam. On 29<sup>th</sup> October, 2019 at 0300 hours, the victims were heading to their respective business centre. They met four boys at Kigogo Fresh shule, Chanika area. PW1 testified that she was stabbed on her neck and shoulder and her hand bag, sweater and Tshs. 30,000/= were stolen. She raised an alarm which was responded by the security officer of Kigogo Shule. As the said security officer whistled, many people ran after the robbers. They managed to arrest the appellant who had run into a nearby house. He was identified by PW1 as the person who had stabbed and robbed her.

As the matter was reported to the police, PW2 and PW4 went to the scene of crime. They found the appellant in the hands of an angry mob. He had been beaten and roped to a tree. PW2 and PW4 testified that the appellant admitted to have committed the offence and that he named the other three persons. Further to that, PW2 and PW4 seized different items alleged to have been stolen by the appellant and other three persons. The oral testimonies adduced by the prosecution witnesses was corroborated by three documentary evidence to wit, PF3 of the PW1 (Exhibit P1), Certificate of Seizure (Exhibit P2) and cautioned statement of appellant (Exhibit P3) which was recorded by PW4.

In his defence, the appellant denied having committed the offence. His evidence was to the effect that he was arrested on 30<sup>th</sup> September, 2019 and taken to the police station where he was ordered to sign a document that was tendered by the prosecution as a cautioned statement.

In view of the evidence adduced by the prosecution and defence, the trial court was satisfied that the prosecution had proved its case against the appellant on the first account but failed to prove the second count. Further to this, other three accused persons were not found guilty of both counts.

As a result, the appellant was convicted and sentenced to serve thirty years imprisonment on the first count.

Not amused, the appellant appealed to this Court raising eight (8) ground of appeal which hinges on four complaints as follows:-

1. That trial court erred in law and fact by convicting the appellant basing on evidence of visual identification which was weak.
2. That trial court erred in law and fact by convicting the appellant basing on a cautioned statement which was recorded and admitted in evidence contrary to the law.
3. That trial court erred in law and fact by failing to draw an adverse inference against the prosecution for failing to call the witnesses who arrested him.
4. That trial court erred in law and fact by failing to consider that the prosecution case was not proved beyond all reasonable doubts.

In the course of hearing this appeal, parties were asked to address the Court on the following two issues. *One* whether the first count was not defective for failure to indicate whether the screw driver was used in order to obtain or retain the stolen property. *Two*, whether the charge sheet and

evidence adduced by the prosecution was not at variance on the properties stolen from PW1.

During the hearing, the appellant appeared in person while Ms. Angelina Nchalla, learned Senior State Attorney appeared for the respondent. Both parties made their respective submissions on the grounds of appeal.

At first, the learned Senior State Attorney supported the conviction and sentence. However, when asked by the Court to address on the above two issues which relates to the propriety of the charge sheet preferred against the appellant, she supported the appeal. The appellant being a lay person had nothing substantial to submit on the issue raised by the Court.

Having considered the submission made by the appellant and the learned Senior State Attorney, I wish to begin with the issue that the charge sheet is defective for failure to indicate whether the weapons (screw driver) were used in order to obtain or retain the stolen property. It was Ms. Nchalla's submission that such omission was a defect which was fatal thereby affecting the trial court's proceedings, conviction and sentence. For better

understanding of the discussion at hand, the first count is reproduced as hereunder:-

***"SADICK JUMA, SHABAN JUMA, RAMADHAN KONDO PENGU and MAUA RAMADHAN, on 29<sup>th</sup> day of September, 2019 at Kigogo Fresh, Chanika area within Ilala District in Dar es Salaam a Region, did steal one hand bag and cash money to the tune of Tshs. 30,000/=, the property of AFSA DAUDI and immediately before such stealing did threaten AFSA DAUDI by stabbing one AFSA DAUDI with a screw driver on her neck and head."***

As stated earlier, the statement of offence shows that the said offence was committed under section 287A of the Penal Code. In terms of the settled law, the offence of armed robbery under section 287A of the Penal Code is proved by these ingredients: *One*, the accused person must have stolen a property. *Two*, at or immediately before or after stealing, the accused person must be armed with a dangerous or offensive weapon or instrument. *Three*, at or immediately before or after stealing, the accused person must have used or threatened to use violence in order to obtain or retain the stolen property. [See **Juma Charles @ Ruben and Another vs R**, Criminal Appeal No. 566 of 2017 (unreported). Pursuant to section 232 of the CPA,

the said ingredients must be included in the particulars of the offence of armed robbery.

The particulars of the offence in the case at hand do not show that immediately before the stealing, the appellant and other suspects threatened PW1 in order to obtain and retain the hand bag and cash money. It is my considered view that the omission to state such fact rendered the charge sheet defective.

Another defect is on the variance between the charge sheet and evidence, in respect of the properties stolen by the appellant. As rightly submitted by Ms. Nchalla, while the charge sheet shows that one hand bag and cash money (Tshs. 30,000) were stolen, PW1 testified that her sweater was also stolen. In view of section 234 of the CPA, the prosecution ought to have prayed to amend the charge. It is trite law that failure to amend the charge sheet is fatal and that it renders the evidence incompatible with the charge sheet. This stance was taken by the Court of Appeal in case of **Issa Mwanjiku @ White vs Republic**, Criminal Appeal No. 175 of 2018 (all unreported), where it was held as follows:-

*"We note that, other items mentioned by PW1 to be among those stolen like, ignition switches of tractor and*

*Pajero were not indicated in the charge sheet. In the prevailing circumstances of this case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard"*

In the light of the above position, the first count was not proved because the particulars of offences of the charge sheet differ with evidence adduced by the prosecution.

Apart from the charge sheet being defective, I agree with the appellant and the respondent that the prosecution did not prove its case beyond all reasonable doubt due to the following reasons.

*First*, the prosecution's case is based on the cautioned statement (Exhibit P3) tendered by PW4. I agree with Ms. Nchalla that the appellant did not object admission of the said cautioned statement. However, he asked the trial court to consider whether it was recorded in accordance with the law. In its judgment the trial court did not consider whether the cautioned statement was recorded in accordance with the law. Having gone through the record, I have noted both PW2 and PW4 testified to have recorded the cautioned statement. It was PW1's evidence that, he took the appellant to

the hospital after recording his statement. On the other hand, PW4 stated that the appellant was taken to the hospital before being presented to the police station where the cautioned statement was recorded. Such contradictions give rise to doubts on the issue whether the cautioned statement was recorded in accordance with the law.

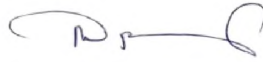
*Two*, PW1 and PW3 were together on the fateful day. However, they contradicted each other on one of the ingredients of the offence of stealing. As stated earlier, PW1 testified that the persons who attacked her stole from her one hand bag, Tshs. 30,000 and sweater. However, PW3's evidence was to the effect that, PW1 was wounded by one of the attackers. He did not state whether the hand bag or any property was stolen from PW1.

*Three*, it is gleaned from the evidence of PW2 and PW3 that a nearby house was searched and several properties including hand bag recovered therefrom. Although the prosecution tendered the certificate of seizure, the hand bag and other items were not tendered. The trial court was also not told whether PW1 identified the said hand bag to be hers.

For the reasons I have endeavored to narrate, I exercise this Court's revisional powers by nullifying the proceedings of the trial court for being

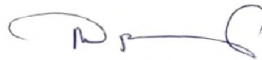
premised on the charge sheet which was defective. Consequently, the judgment and conviction are hereby quashed and the sentence imposed by the trial court set aside. In the end result, I order immediate release of the appellant from prison unless he is otherwise lawfully held.

DATED at DAR ES SALAAM this 25<sup>th</sup> day of April, 2022.



S.E. Kisanya  
JUDGE

Court: Ruling delivered this 25<sup>th</sup> day of April, 2022 in the presence of the appellant and Ms. Angelina Nchalla, learned Senior State Attorney for the respondent.



S.E. Kisanya  
JUDGE  
25/04/2022